

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-76709; File No. SR-BATS-2015-115)

December 21, 2015

Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Related to Fees for Use of BATS Exchange, Inc.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on December 17, 2015, BATS Exchange, Inc. (the “Exchange” or “BATS”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as one establishing or changing a member due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A)(ii) of the Act<sup>3</sup> and Rule 19b-4(f)(2) thereunder,<sup>4</sup> which renders the proposed rule change effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange filed a proposal to amend the Market Data section of its fee schedule to: (i) adopt definitions for the terms “Non-Display Usage” and “Trading Platforms”; and (ii) amend the fees for TCP Depth and Multicast Depth data products,<sup>5</sup> also known as BZX Depth, to increase the Internal Distributor fee and adopt a new fee for Non-Display Usage.

The text of the proposed rule change is available at the Exchange’s website at

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>4</sup> 17 CFR 240.19b-4(f)(2).

<sup>5</sup> See Exchange Rule 11.22(a) and (c).

[www.batstrading.com](http://www.batstrading.com), at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Market Data section of its fee schedule to: (i) adopt definitions for the terms "Non-Display Usage" and "Trading Platforms"; and (ii) amend the fees for BZX Depth to increase the Internal Distributor fee and adopt a new fee for Non-Display Usage.

Definitions

The Exchange proposes to adopt definitions for the terms "Non-Display Usage" and "Trading Platforms". The proposed definitions are designed to provide greater transparency with regard to how the Exchange assesses fees for market data. Non-Display Usage would be defined as "any method of accessing a Market Data product that involves access or use by a machine or automated device without access or use of a display by a natural person or persons."<sup>6</sup> The term

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<sup>6</sup> The proposed definition of Non-Display Usage is substantially similar to Nasdaq Stock Market LLC ("Nasdaq") Rule 7023(a)(2)(B), which defines Non-Display Usage as "any method of accessing Depth-of-Book data that involves access or use by a machine or

Trading Platform would be defined as “any execution platform operated as or by a registered National Securities Exchange (as defined in Section 3(a)(1) of the Exchange Act), an Alternative Trading System (as defined in Rule 300(a) of Regulation ATS), or an Electronic Communications Network (as defined in Rule 600(b)(23) of Regulation NMS).”<sup>7</sup>

### BZX Depth Fees

BZX Depth is an uncompressed market data feed that provides depth-of-book quotations and execution information based on equity orders entered into the System.<sup>8</sup>

*Internal Distributor Fee.* Currently, the Exchange charges fees for both internal and external distribution of BZX Depth. The cost of BZX Depth for an Internal Distributor<sup>9</sup> is currently \$1,000 per month. The Exchange also separately charges an External Distributor<sup>10</sup> of BZX Depth a flat fee of \$5,000 per month. The Exchange does not charge Internal and External Distributors separate display User<sup>11</sup> fees. The Exchange now proposes to increase the fee for Internal Distributors from \$1,000 per month to \$1,500 per month. The Exchange does not

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automated device without access or use of a display by a natural person or persons.

<sup>7</sup> The proposed definition of Trading Platform is identical the definition of Trading Platform under Nasdaq Rule 7023(a)(7).

<sup>8</sup> See Exchange Rule 11.22(a) and (c).

<sup>9</sup> An “Internal Distributor” is defined as “a Distributor that receives the Exchange Market Data product and then distributes that data to one or more Users within the Distributor’s own entity.” See the Exchange Fee Schedule available at [http://batstrading.com/support/fee\\_schedule/bzx/](http://batstrading.com/support/fee_schedule/bzx/). A “Distributor” is defined as “any entity that receives the Exchange Market Data product directly from the Exchange or indirectly through another entity and then distributes it internally or externally to a third party.” Id.

<sup>10</sup> An “External Distributor” is defined as “a Distributor that receives the Exchange Market Data product and then distributes that data to a third party or one or more Users outside the Distributor’s own entity.” Id.

<sup>11</sup> A “User” is defined as “a natural person, a proprietorship, corporation, partnership, or entity, or device (computer or other automated service), that is entitled to receive Exchange data.” Id.

proposes to amend its fees for External Distributors.

*Non-Display Usage Fee.* The Exchange also proposes to adopt a new fee for Non-Display Usage by Trading Platforms, which is similar to fees currently being charged by Nasdaq and the New York Stock Exchange, Inc. (“NYSE”).<sup>12</sup> As proposed, subscribers to BZX Depth would pay a fee of \$5,000 per month for Non-Display Usage of BZX Depth by its Trading Platforms. Trading Platforms, as defined above, include registered National Securities Exchanges, Alternative Trading Systems (“ATs”), and Electronic Communications Networks (“ECNs”) as those terms are defined in the Exchange Act and regulations and rules thereunder. The fee would be assessed in addition to existing Distributor fees. The fee of \$5,000 per month would represent the maximum charge per subscriber regardless of the number of Trading Platforms the subscriber operates and receive the data for Non-Display Usage. For example, if a subscriber operates three Trading Platforms that receives BZX Depth for Non-Displayed Usage, that subscriber would continue to pay a total fee of \$5,000 per month, rather than paying \$15,000 per month for its three Trading Platforms (\$5,000 for each Trading Platform).

#### Implementation Date

The Exchange proposes to implement the proposed changes to its fee schedule on January 4, 2016.

#### 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,<sup>13</sup> in general, and furthers the objectives of Section 6(b)(4),<sup>14</sup> in particular, as

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<sup>12</sup> See Nasdaq Rule 7023(d) (setting forth a Trading Platform Fee of \$5,000 per trading platform up to a maximum of three trading platforms for depth-of-book data). See also NYSE Market Data Fees, November 2015 (providing a monthly fee for non-display usage of \$5,000 for NYSE OpenBook).

<sup>13</sup> 15 U.S.C. 78f.

it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its members and other recipients of Exchange data. The Exchange believes that the proposed rates are equitable and non-discriminatory in that they apply uniformly to all recipients of Exchange data. The Exchange believes the proposed fees are competitive with those charged by other venues and, therefore, reasonable and equitably allocated to recipients. Lastly, the Exchange also believes that the proposed fees are reasonable and non-discriminatory because they will apply uniformly to all recipients of Exchange data.

The Exchange also believes that the proposed rule change is consistent with Section 11(A) of the Act<sup>15</sup> in that it supports (i) fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets and (ii) the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities. Furthermore, the proposed rule change is consistent with Rule 603 of Regulation NMS,<sup>16</sup> which provides that any national securities exchange that distributes information with respect to quotations for or transactions in an NMS stock do so on terms that are not unreasonably discriminatory. In adopting Regulation NMS, the Commission granted self-regulatory organizations and broker-dealers increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data.

In addition, the proposed fees would not permit unfair discrimination because all of the Exchange's subscribers will be subject to the proposed fees on an equivalent basis. BZX Depth

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<sup>14</sup> 15 U.S.C. 78f(b)(4).

<sup>15</sup> 15 U.S.C. 78k-1.

<sup>16</sup> See 17 CFR 242.603.

is distributed and purchased on a voluntary basis, in that neither the Exchange nor market data distributors are required by any rule or regulation to make this data available. Accordingly, Distributors and Users can discontinue use at any time and for any reason, including due to an assessment of the reasonableness of fees charged. Firms have a wide variety of alternative market data products from which to choose, such as similar proprietary data products offered by other exchanges and consolidated data. Moreover, the Exchange is not required to make any proprietary data products available or to offer any specific pricing alternatives to any customers.

In addition, the fees that are the subject of this rule filing are constrained by competition. As explained below in the Exchange's Statement on Burden on Competition, the existence of alternatives to BZX Depth further ensures that the Exchange cannot set unreasonable fees, or fees that are unreasonably discriminatory, when subscribers can elect such alternatives. That is, the Exchange competes with other exchanges (and their affiliates) that provide similar market data products. If another exchange (or its affiliate) were to charge less to consolidate and distribute its similar product than the Exchange charges to consolidate and distribute BZX Depth, prospective Users likely would not subscribe to, or would cease subscribing to, BZX Depth.

The Exchange notes that the Commission is not required to undertake a cost-of-service or rate-making approach. The Exchange believes that, even if it were possible as a matter of economic theory, cost-based pricing for non-core market data would be so complicated that it could not be done practically.<sup>17</sup>

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<sup>17</sup> The Exchange believes that cost-based pricing would be impractical because it would create enormous administrative burdens for all parties, including the Commission, to cost-regulate a large number of participants and standardize and analyze extraordinary amounts of information, accounts, and reports. In addition, it is impossible to regulate market data prices in isolation from prices charged by markets for other services that are joint products. Cost-based rate regulation would also lead to litigation and may distort incentives, including those to minimize costs and to innovate, leading to further waste.

The proposed amendment to the Internal Distributor fee for BZX Depth is also equitable and reasonable as, despite the increase, the fee proposed continues to be less than similar fees currently charged by Nasdaq and NYSE for their depth-of-book data products.<sup>18</sup> In addition, the proposed Non-Display Usage fee by Trading Platforms for BZX Depth is equitable and reasonable as the fees proposed are equal to, and in some cases less than, similar fees currently charged by Nasdaq for its depth-of-book data. Like as proposed by the Exchange, Nasdaq charges subscribers to its depth-of-book data utilized by trading platforms on a non-displayed basis \$5,000 per month.<sup>19</sup> However, unlike the Exchange, a subscriber utilizing Nasdaq depth-of-book data on more than one Trading Platform would pay \$5,000 per month for each up to a maximum fee of \$15,000. The Exchange proposes to charge the same rate regardless of the number of Trading Platforms receiving the data for Non-Display Usage operated by that subscriber.

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Under cost-based pricing, the Commission would be burdened with determining a fair rate of return, and the industry could experience frequent rate increases based on escalating expense levels. Even in industries historically subject to utility regulation, cost-based ratemaking has been discredited. As such, the Exchange believes that cost-based ratemaking would be inappropriate for proprietary market data and inconsistent with Congress's direction that the Commission use its authority to foster the development of the national market system, and that market forces will continue to provide appropriate pricing discipline. See Appendix C to NYSE's comments to the Commission's 2000 Concept Release on the Regulation of Market Information Fees and Revenues, which can be found on the Commission's website at <http://www.sec.gov/rules/concept/s72899/buck1.htm>. See also Securities Exchange Act Release No. 73816 (December 11, 2014), 79 FR 75200 (December 17, 2014) (SR-NYSE-2014-64) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Establish an Access Fee for the NYSE Best Quote and Trades Data Feed, Operative December 1, 2014).

<sup>18</sup> See Nasdaq Rule 7023(c) (providing for fees of \$25,000 to \$500,000 to internal distributors of Nasdaq Depth-of-Book products). See also NYSE Market Data Fees, November 2015 (providing a \$5,000 per month access fee for NYSE OpenBook).

<sup>19</sup> See Nasdaq Rule 7023(d). See also NYSE Market Data Fees, November 2015 (providing a monthly fee for non-display usage of \$5,000 for NYSE OpenBook).

The Trading Platform fee is also equitable and reasonable in that it ensures that heavy users of the BZX Depth pay an equitable share of the total fees. Currently, External Distributors pay higher fees than Internal Distributors based upon their assumed higher usage levels. The Exchange believes that Trading Platforms are generally high users of the data, using it to power a matching engine for millions or even billions of trading messages per day.

Lastly, the Exchange believes that the proposed definitions are reasonable because they are designed to provide greater transparency to Members with regard to how the Exchange would assess the proposed fee for Non-Display Usage of BZX Depth by Trading Platforms. The Exchange believes that Members would benefit from clear guidance in its fee schedule describing the manner in which it assesses fees. These definitions are intended to make the fee schedule clearer and less confusing for investors and eliminate potential investor confusion, thereby removing impediments to and perfecting the mechanism of a free and open market and a national market system, and, in general, protecting investors and the public interest. Lastly, the proposed definitions are based on existing rules of Nasdaq.<sup>20</sup>

#### B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. The Exchange's ability to price BZX Depth is constrained by: (i) competition among exchanges, other trading platforms, and Trade Reporting Facilities ("TRF") that compete with each other in a variety of dimensions; (ii) the existence of inexpensive real-time consolidated data and market-specific data and free delayed data; and (iii) the inherent contestability of the market for proprietary data.

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<sup>20</sup> Nasdaq Rules 7023(a)(2)(B) and (a)(7).



The Exchange and its market data products are subject to significant competitive forces and the proposed fees represent responses to that competition. To start, the Exchange competes intensely for order flow. It competes with the other national securities exchanges that currently trade equities, with electronic communication networks, with quotes posted in FINRA's Alternative Display Facility, with alternative trading systems, and with securities firms that primarily trade as principal with their customer order flow.

In addition, BZX Depth competes with a number of alternative products. For instance, BZX Depth does not provide a complete picture of all trading activity in a security. Rather, the other national securities exchanges, the several TRFs of FINRA, and ECNs that produce proprietary data all produce trades and trade reports. Each is currently permitted to produce depth-of-book information products, and many currently do, including Nasdaq and NYSE.

In sum, the availability of a variety of alternative sources of information imposes significant competitive pressures on Exchange data products and the Exchange's compelling need to attract order flow imposes significant competitive pressure on the Exchange to act equitably, fairly, and reasonably in setting the proposed data product fees. The proposed data product fees are, in part, responses to that pressure. The Exchange believes that the proposed fees would reflect an equitable allocation of its overall costs to users of its facilities.

In addition, when establishing the proposed fees, the Exchange considered the competitiveness of the market for proprietary data and all of the implications of that competition. The Exchange believes that it has considered all relevant factors and has not considered irrelevant factors in order to establish fair, reasonable, and not unreasonably discriminatory fees and an equitable allocation of fees among all Users. The existence of alternatives to BZX Depth, including existing similar feeds by other exchanges, consolidated data, and proprietary data from

other sources, ensures that the Exchange cannot set unreasonable fees, or fees that are unreasonably discriminatory, when subscribers can elect these alternatives or choose not to purchase a specific proprietary data product if its cost to purchase is not justified by the returns any particular vendor or subscriber would achieve through the purchase.

The Exchange believes the proposed increase to the Internal Distributor fee and adoption of the fee for Non-Display Usage by Trading Platforms for BZX Depth would increase competition amongst the exchanges that offer depth-of-book products. The Exchange notes that, despite the proposed increase, the Internal Distribution fee for BZX Depth continues to be less than similar fees currently charged by Nasdaq and NYSE for its depth-of-book data.<sup>21</sup> In addition, the proposed Non-Display Usage fee by Trading Platforms is equal to, and in some cases less than, similar fees currently charged by Nasdaq for its Depth-of-Book data.<sup>22</sup>

Lastly, the proposed definitions will not result in any burden on competition. The Exchange believes that Members would benefit from clear guidance in its fee schedule describing the manner in which it assesses fees. These definitions are intended to make the fee schedule clearer and less confusing for investors and are not designed to have a competitive impact.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

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<sup>21</sup> See supra note 18.

<sup>22</sup> See supra note 19.

### III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>23</sup> and paragraph (f) of Rule 19b-4 thereunder.<sup>24</sup> At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

#### Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-BATS-2015-115 on the subject line.

#### Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-BATS-2015-115. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies

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<sup>23</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>24</sup> 17 CFR 240.19b-4(f).

of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-BATS-2015-115, and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>25</sup>

Brent J. Fields  
Secretary

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<sup>25</sup> 17 CFR 200.30-3(a)(12).